BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUSTIN E. COATS	)	
Claimant	)	
VS.	)	
	)	
DILLY DALLY OIL, LLC	)	Docket No. 1,058,233
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the February 27, 2013, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Troy A. Unruh of Pittsburg, Kansas, appeared for claimant. Paul M. Kritz of Coffeyville, Kansas, appeared for respondent. David J. Bideau of Chanute, Kansas, appeared for the Kansas Workers Compensation Fund.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 13, 2013, preliminary hearing and exhibits thereto; the transcript of the February 8, 2013, discovery deposition of Dale Tharp and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges he sustained a head injury by accident on September 11, 2011, arising out of and in the course of his employment with respondent.

ALJ Moore granted respondent's and the Fund's motions to dismiss because respondent did not have an annual payroll of $20,000 as required by K.S.A. 44-505(a). ALJ Moore concluded that the Kansas Workers Compensation Act (Act) did not apply and in the Preliminary Hearing Order stated:

> The record before the court fails to establish that Dilly Dally Oil, L.L.C. had a payroll in excess of $20,000.00 for either 2010 or 2011. There is no testimony in

> the record as to Mr. Tharp's *expectations* with respect to the 2011 payroll of Dilly Dally Oil, L.L.C. Even if the payments that could be characterized as payroll of both Dilly Dally Oil[,] L.L.C. and the Cat [C]ompany are combined, after payments to legitimate independent contractors are deducted, the aggregate fails to meet the $20,000.00 statutory threshold.[1]

ALJ Moore also found that claimant was working for respondent at the time of the accident, respondent was not engaged in an agricultural pursuit, and claimant sustained personal injury by accident arising out of and in the course of his employment on September 11, 2011.

Claimant appeals and asserts ALJ Moore erred in finding respondent failed to meet the $20,000 annual payroll threshold.

Respondent argues that it has an annual payroll of less than $20,000 and, consequently, the Act does not apply. The Kansas Workers Compensation Fund (Fund) asks the Board to affirm ALJ Moore's Preliminary Hearing Order and it raises three defenses: (1) claimant was working for Cat Company, Inc., not respondent, at the time of the accident; (2) respondent did not have an annual payroll of at least $20,000 and, therefore, pursuant to K.S.A. 44-505(a)(2), the Act does not apply; and (3) claimant was engaged in agricultural work when injured and, therefore, pursuant to K.S.A. 44-505(a)(1), the Act does not apply.

The issues in this matter are:

1. Did claimant's personal injury by accident arise out of and in the course of his employment with respondent? Specifically, at the time of the accident was claimant an employee of respondent or Cat Company, Inc.?

2. At the time of the accident, was respondent engaged in an agricultural pursuit?

3. If claimant was an employee of respondent, did respondent have, as required by K.S.A. 44-505(a)(2), an annual payroll of at least $20,000?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On February 8, 2013, claimant deposed Dale Tharp, owner and operator of respondent. He testified that when the accident occurred on September 11, 2011, he and

[1] ALJ Order (Feb. 27, 2013) at 6.

claimant were pulling pipe from a well owned by respondent. Mr. Tharp indicated that at the time, claimant was working for Cat Company and that Cat Company paid claimant for his services. Mr. Tharp testified that he was the sole owner of Cat Company, his farm entity, which was incorporated in 1998. The pipe was being pulled from the well to be used on Mr. Tharp's farm.

At his deposition, Mr. Tharp testified that respondent became a limited liability company (LLC) in July 2010 and was closed down in August 2012. He indicated that on the date of the accident, respondent did not have workers compensation insurance. In 2010, respondent paid $2,458.75 in wages. During Mr. Tharp's deposition, claimant stipulated that respondent did not have a payroll in excess of $20,000 during 2010. Mr. Tharp testified that in 2011, respondent paid $21,097.58 in wages. Of the $21,097.58 paid in 2011 to employees, $5,557.00 in wages was paid to relatives other than Mr. Tharp. Mr. Tharp did not know if he received a salary from respondent or worked off of a profit or loss.

At Mr. Tharp's deposition, the 2010 and 2011 Schedule Cs of Mr. Tharp's tax returns were made exhibits. They showed that $20,522 in 2010 and $21,098 in 2011 was paid for contract labor. The 2010 Schedule C showed a profit of $80,105 and the line on the 2011 Schedule C showing profit or loss was redacted.

On February 11, 2013, the Fund filed a motion to dismiss based upon the three defenses set forth above. The motion to dismiss was taken up at the preliminary hearing. At the preliminary hearing, the parties stipulated that on September 11, 2011, claimant sustained personal injury by accident and that claimant's accident was the prevailing factor causing his injury, medical condition, disability or impairment. In light of a recent appellate court decision, ALJ Moore allowed claimant to withdraw his stipulation that respondent did not have a payroll in excess of $20,000 during 2010.

At the preliminary hearing, Mr. Tharp testified that not all of the $20,522 listed as contract labor in respondent's 2010 Schedule C was wages paid to employees, as some of it was paid to independent contractors. Mr. Tharp indicated that in 2011, Dilly Dally made a profit of $81,123.

Claimant testified that when he was injured, he was working for respondent. He testified that he and Mr. Tharp were rebuilding a pump and were pulling the pipe out of the well to get to the pump that was located in the bottom of the well. Claimant testified:

> Q. (Mr. Unruh) Did you ever perform any work on his [Mr. Tharp's] farm as far as you can recall?
>
> A. (Claimant) No, I was pretty much strictly working on his lease.
>
> Q. Okay. And how did Mr. Tharp pay you?

A. Check generally.

Q. And what was the check from, what account?

A. Dilly Dally.[2]

No withholdings for taxes or Social Security were deducted from claimant's wages. Claimant denied ever working for Cat Company.

At the preliminary hearing, images of checks were introduced showing that respondent and Cat Company made payments to claimant. All of the checks from respondent were dated prior to September 11, 2011. Five checks from Cat Company dated September 5 through September 22, 2011, were paid to claimant. In September 2011, $1,000 from the account of respondent was transferred into the account of Cat Company.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

K.S.A. 44-505 states in part:

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
>
> (1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state;
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> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably

[2] P.H. Trans. at 26.

[3] K.S.A. 2011 Supp. 44-501b(c).

[4] K.S.A. 2011 Supp. 44-508(h).

> estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;
>
> (3) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection;

The Board affirms ALJ Moore's findings in all respects. Claimant was clearly an employee of respondent when he was accidentally injured on September 11, 2011. Claimant testified that when he was injured, he and Mr. Tharp were repairing a pump. Prior to September 5, 2011, claimant was paid with checks from respondent. Beginning September 5, claimant received several small checks from Cat Company. Mr. Tharp decided which checking account he would use to pay claimant and did not appear to tell claimant which entity he was working for. Claimant testified that "I was pretty much strictly working on his lease,"[5] which supports claimant's assertion that he worked for respondent, not Cat Company.

In *Olds-Carter*,[6] respondent was owned by Mr. Russell. The Kansas Court of Appeals determined the respondent's business was to lease equipment to Mr. Russell for his farming operation. Claimant was injured while driving a truck for respondent to pick up a load of corn. The ALJ, Board and Kansas Court of Appeals concluded that respondent was not engaged in an agricultural pursuit. The Kansas Court of Appeals stated:

> Determining whether a workers compensation claimant is involved in an agricultural pursuit is a question of fact which must be decided on a case-by-case basis. *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 7, 760 P.2d 43, *rev. denied* 243 Kan. 778 (1988). The *Frost* case sets out a two-step analysis for determining whether a workers compensation claimant was engaged in an agricultural pursuit when injured:
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> > "To determine whether a workers' compensation claimant was engaged in an agricultural pursuit at the time of injury requires a two-step analysis. The first step is to determine whether the

[5] P.H. Trans. at 26.

[6] *Olds-Carter v. Lakeshore Farms, Inc.,* 45 Kan. App. 2d 390, 250 P.3d 825 (2011).

> employer was engaged in an agricultural pursuit. If the answer to this question is no, then the court may find that there is coverage. If the answer is yes, then the court proceeds to the second step, which is to determine if the injury occurred while the employee was engaged in an employment incident to an agricultural pursuit. If the answer to that question is also yes, then the employee is not covered by the Act. If the answer to that question is no, then there is coverage." 13 Kan. App. 2d 5, Syl. ¶ 2.
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> In addition, there are three considerations for determining whether a specific pursuit or business is an agricultural pursuit within the meaning of K.S.A. 44-505(a)(1): "(1) the general nature of the employer's business; (2) the traditional meaning of agriculture as the term is commonly understood; and (3) each business will be judged on its own unique characteristics." *Whitham v. Parris*, 11 Kan. App. 2d 303, Syl. ¶ 3, 720 P.2d 1125 (1986).[7]

In the present claim, respondent was in the oil business and was not engaged in an agricultural pursuit at the time of the accident. Pulling pipe from an oil well so that the pipe could be used on a farm is not an agricultural activity. Therefore, the agricultural pursuit exception does not apply.

Next, the Board considers whether respondent's annual payroll met the $20,000 threshold. From the facts presented, it is evident that in 2010 and 2011, respondent's payroll did not reach $20,000. Nor was there any testimony that respondent's payroll in 2011 was expected to exceed $20,000.

Claimant argues that under K.A.R. 51-11-6, payments made to Mr. Tharp should be considered part of respondent's annual payroll. K.A.R. 51-11-6 states:

> In computing the gross annual payroll for an employer to determine whether they are subject to the workers' compensation act, all payroll paid by that employer to all workers shall be included. The computation shall include all payroll whether or not that payroll is paid to employees in the state of Kansas or outside the state of Kansas.
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> The provision in K.S.A. 44-505 excluding the payroll of workers who are members of the employer's family shall not apply to corporate employers.
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> A corporate employer's payroll for purposes of determining whether the employer is subject to the workers' compensation act shall be determined by the total amount of payroll paid to all corporate employees even when a corporate employee has elected out of the workers' compensation act pursuant to K.S.A. 44-543.

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[7] *Id.* at 396.

The fallacy of claimant's legal theory is that Mr. Tharp was not on respondent's payroll. Rather, Mr. Tharp was the owner of respondent. The evidence indicates respondent made a net profit in 2010 and 2011. Mr. Tharp was never paid wages by respondent, but instead was entitled to respondent's profits. Respondent could also have lost money for Mr. Tharp in 2010 and 2011. This Board Member finds that payments made by respondent to Mr. Tharp were not wages and, therefore, should not be included in respondent's annual payroll. Consequently, respondent's 2010 and 2011 annual payrolls were less than $20,000.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

CONCLUSION

1. When claimant sustained his accident, he was employed by respondent.

2. At the time of the accident, respondent was not engaged in an agricultural pursuit.

3. Respondent, under K.S.A. 44-505(a)(2), did not have an annual payroll sufficient for the Act to apply.

WHEREFORE, the undersigned Board Member affirms the February 27, 2013, Preliminary Hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of May, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

[8] K.S.A. 2012 Supp. 44-534a.

[9] K.S.A. 2012 Supp. 44-555c(k).

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